SUPREME COURT, U. S.

Supreme Court, U. S.
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Supreme Court

of the

United States

NO. 74-640

ECONOMIC RESEARCH ANALYSTS, INC. and RICHARD W. McINTYRE,
Petitioners,

vs.

DANIEL O'CONNELL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PORTER, TREISTER, DONSKY & STEWART
1428 Brickell Avenue
Miami, Florida 33131
Attorneys for Petitioners
By LAWRENCE C. PORTER

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ECONOMIC RESEARCH ANALYSTS, INC.
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The Petitioners, ECONOMIC RESEARCH ANALYSTS, INC. and RICHARD W. McINTYRE, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in these proceedings on August 26, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix B, p. 4, *infra*) is reported at 499 F. 2d 994. The Findings of Fact and Conclusions of Law of the United States District Court of the Southern District of Florida (Miami Division) was not published or incorporated into a reported opinion, and they are set forth in Appendix C (p. 7, *infra*).

JURISDICTION

The Order or Judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 26, 1974. (Appendix A, p. 4, *infra*). The Petition was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1); and pursuant to Rule 19.1(b), Supreme Court Rules. The Court of Appeals, Fifth Circuit, has decided an important question of Federal law which has not been, but should be, settled by this Court.

QUESTIONS PRESENTED

I

WHETHER OR NOT RESPONDENT'S OWN CONDUCT PRIOR TO THE INSTITUTION OF THESE PROCEEDINGS (HE HAD ALREADY OBTAINED IN STATE COURT SUBSTANTIALLY ALL OF THE RELIEF HE SOUGHT IN FEDERAL COURT.) REQUIRES THAT A FEDERAL COURT DENY HIM THE PRIVILEGE OF PENDENT JURISDICTION BECAUSE APPLICATION OF THE DOCTRINE IN THIS SITUATION WOULD DO VIOLENCE TO THE VERY PRINCIPLES UPON WHICH IT IS GROUNDED: JUDICIAL ECONOMY, CONVENIENCE, AND FAIRNESS TO LITIGANTS.

II

WHETHER OR NOT AN AGENT'S TORTS COMMITTED SOLELY FOR HIS OWN PURPOSES ARE COMMITTED WITHIN THE SCOPE OF HIS EMPLOYMENT.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution provides in pertinent part as follows:

> Section 2. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States . . .

STATUTES AND REGULATIONS INVOLVED

1. Title 15, U.S. Code—§78j Provides in pertinent part as follows:

> "*Manipulative and deceptive devices.*
>
> "It shall be unlawful for any person directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —
>
> "(a) . . . . . .
>
> "(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors"

2. Securities Exchange Commission Rule 10b-5.

"*Employment of Manipulative and Deceptive Devices*

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

"(1) to employ any device, scheme, or artifice to defraud,

"(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

3. Florida Statutes 517.301

"*Fraudulent transactions; falsification or concealment of facts.*— It is unlawful and a violation of the provisions of this chapter, for any person:

"(1) in the sale or purchase of any security in this state, including any security exempted under the provisions of §517.05, and including

any securities sold in any transaction exempted under the provisions of §517.06, directly or indirectly:

"(a) To employ any device, scheme or artifice to defraud;

"(b) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made not misleading;

"(c) To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security.

"(2) To publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, communication or broadcast which though not purporting to offer a security for sale, describes such security for a consideration received or to be received directly or indirectly from an insurer, underwriter, or dealer, or from an agent or employee of an insurer, underwriter or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

"(3) In any matter within the jurisdiction of the department to knowingly and willfully

falsify, conceal or cover up by any trick, scheme, or device, a material fact, or make any false, fictitious or fraudulent statement or representation, or make or use any false writing or document, knowing the same to contain any false, fictitious or fraudulent statement or entry."

STATEMENT OF THE CASE

The Petitioners herein are Economic Research Analysts, Inc. ("ERA"), a registered broker/dealer, and Richard W. McIntyre ("McIntyre"), the Chief Executive of ERA. The Respondent, Daniel O'Connell ("O'Connell"), was granted a judgment against ERA and McIntyre for violations of Section 10(b) of the Securities Exchange Act of 1934, as amended, (15 U.S.C. Section 78j (b)) (the "Exchange Act") and Rule 10b-5 promulgated thereunder and for having perpetrated fraud as a matter of law. As shall be set forth with more particularity below, the gist of Respondent's Complaint was that Richard F. Petersen ("Petersen"), a registered representative of ERA, perpetrated a fraud upon him in connection with the sale of certain securities.

In September of 1969, Respondent filed an action in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, Florida against Marine Environmental Data, Inc., Francis C. Gibout, Richard F. Petersen, and Ann H. Petersen seeking recovery for violations of his rights under the "securities laws" and the anti-fraud provisions of the Florida common law in connection with the offer and sale of securities of a mutual fund known as Colonial Ventures,

a corporation called Stacey-Gifford Company, and a corporation called Marine Environmental Data, Inc. (Appendix D., p. 24, *infra*) On February 7, 1972 he obtained a Final Judgment by Default for $11,800. (Appendix E., p. 32, *infra*) The Petitioners were not named or mentioned in this Complaint.

Then, on April 27, 1972, Respondent filed a Complaint in the United States District Court for the Southern District of Florida seeking recovery against the Petitioners for violations of his rights as protected by Section 10b of the Exchange Act and by the anti-fraud provisions of the Florida common law.

At trial, Respondent testified that on August 12 and September 12, 1968, he purchased 200 and 350 shares, respectively, of Common Stock in the Stacey-Gifford Company ("Stacey-Gifford") from Petersen being unadvised that the shares he would ultimately receive would once have belonged to Defendant McIntyre. While Petersen's application to become registered with ERA had been approved by the Securities Commission of the State of Florida and the National Association of Securities Dealers, Inc. ("NASD") some time in August 1968, Petersen did not become effectively registered with ERA until September 13, 1968. On that date he was mailed a letter from ERA advising him that he had been assigned an ERA registered representative's code number. Without this code number, he could not make sales on behalf of ERA. Therefore, the 200 and 350 shares of Stacey-Gifford were purchased by the Plaintiff before Petersen was actually an operating registered representative of ERA. Even though the mere delivery of these shares occurred later, McIntyre testified that he told the Plaintiff on the telephone that he would

receive shares which had previously been owned by McIntyre. McIntyre asked him for registration instructions as there was some confusion as to in whose name they would be registered. The Trial Judge found differently.

Beginning in early 1968, the Respondent had begun to purchase the Stacey-Gifford stock from Petersen. These transactions, as well as certain of those which occurred between the Plaintiff and Petersen after Petersen had become registered with ERA, took place at Petersen's own offices or in the home of either Petersen or the Respondent. The checks issued by the Plaintiff for these purchases, as well as for all the other purchases giving rise to this cause of action, were issued to the order of Petersen, individually, not to ERA, and they were endorsed by Petersen or his own firm, not ERA.

The evidence also indicated that Respondent continued to buy stock in Stacey-Gifford after July of 1969, which was the date that he began to suspect that something was "wrong" with respect to the transactions between himself and Petersen. In that connection, the Respondent testified that he did not care from where these securities came. Moreover, the price which Respondent paid for these securities had declined from $6 per share to $2 and then to $1 per share.

The evidence indicated that on January 28, 1969, the Respondent agreed to purchase an as yet then undetermined number of shares of Colonial Ventures, and in connection therewith gave Petersen a check for $3,000 payable to the order of Petersen, not ERA. Petersen testified, and there was no evidence in rebut-

tal, to the effect that the Respondent was aware that at the time the purchase price was paid, Colonial Ventures was not in existence, and would be "forthcoming". Petersen testified that he had financial difficulties at the time and although he did not intend to defraud the Respondent, since the mutual fund was not yet in existence, he suggested to the Respondent that he (O'Connell) use the Colonial Ventures money together with $7,000 to buy shares in a new company being formed to capitalize on the then current craze for pollution-control equipment, said company being Marine Environmental Data, Inc. ("Marine Environmental"). Petersen explained that he made it quite clear to the Respondent that he would not be buying the stock of Neurus Corporation ("Neurus"), but that he would be participating in a private placement of securities of a new company. Petersen explained that Marine Environmental had an affiliation with Neurus as its sales arm in Florida, the technical founders and principals of Neurus being unable to market their own product. He told the Respondent that the only securities connection between the two companies would be that should Marine Environmental be successful, it would be granted stock options to purchase the stock of Neurus.

The Respondent testified that he had agreed to buy Neurus, and the Trial Judge agreed.

On March 18, 1969, the Respondent agreed to purchase 300 shares of Stacey-Gifford. This $1,800 was converted by Petersen to his own use, and these shares of Stacey-Gifford were never delivered by Petersen to the Respondent.

As stated earlier, all of the checks issued for payment of the aforementioned securities were made to the order of Petersen or his own company. In addition, the Respondent never had an account with ERA, he received no confirmation slips from ERA with respect to his transactions, nor did he ever receive a monthly statement of account from ERA.

In conclusion, the evidence indicated that Respondent never had an account with ERA and that in dealing with Petersen, the Plaintiff was dealing with him as an individual and not as an agent of ERA. Moreover, since Respondent discovered the fraud in June of 1969, but filed his Complaint on April 27, 1972, his action was barred by the Statute of Limitations, since the Complaint was filed more than two years after the fraud was discovered.

Petitioners moved to dismiss Respondent's District Court Complaint on the grounds that the Federal claim was barred by the statute of limitations; that the Complaint did not state a cause of action for common law fraud; and that should the federal claim be denied, the state claim should fall for lack of jurisdiction, there being no diversity of citizenship between the parties. This motion was denied.

After the trial, Petitioners appealed to the United States Court of Appeals for the Fifth Circuit. Shortly before, a case virtually identical to Respondent's (*Cyril M. Hudak v. Economic Research Analysts, Inc. and Richard W. McIntyre*) was brought in the Southern District of Florida. This case was also decided adversely to the Petitioners, and this Judgment was also appealed. The two appeals were then consolidated for oral argument.

On appeal, the Fifth Circuit ruled that both Federal claims were barred by the statute of limitations applicable to 10b-5 litigation in Florida. However, this particular cause was reversed and remanded to the District Court for a determination of whether or not the District Court had determined to hear the pendent claim (which would not be barred by the statute of limitations applicable to it) and, if so, to permit the District Court to make such specific findings. The Findings of Fact and Conclusions of Law were held to be ambiguous on this point. The *Hudak* judgment, as a practical matter, however, stood, because notwithstanding the failure of the Federal claim, the Fifth Circuit upheld the District Court's assumption of pendent jurisdiction by sustaining the State claim for Florida common law fraud.

REASONS FOR GRANTING THE WRIT

I. PENDENT JURISDICTION

Perhaps recognizing that the doctrine of pendent jurisdiction is not absolute and beyond reproach, Justice Brennan, speaking for the majority in *United Mineworkers of America v. Gibbs*, 383 U.S. 715 (1966) emphasized that the doctrine is one of discretion and not of plaintiff's right. The efficacy of certain criticisms of the doctrine are illustrated by the case at bar.

Traditionally, State Courts are and should be vested with concurrent jurisdiction: they may and should entertain and dispose of, at one sitting, Federal and State claims. There are, of course, exceptions to this power. One of those exceptions appears to — but in fact does not — exist here: actions brought pursuant to the Exchange Act are to be tried in Federal Courts only.

However, the kind of relief afforded by the Exchange Act is also afforded by the equivalent provision of the Florida Blue Sky Law.[1]/ Therefore, while it is true that a Florida State Court would not have been able to entertain this action, based as it was, upon the Exchange Act, it would have what can be called "effective" concurrent jurisdiction, and it could afford plaintiff the kind of protection afforded by the Exchange Act. The result of the existence of the Florida Blue Sky Law remedy is that the Congressional policy of granting State Courts concurrent jurisdiction over Federal and State claims may be accommodated, and this is proper. Such being the case, it would be an affront to comity for this Court to exercise pendent jurisdiction and entertain the State claim.

More practically, the existence of this so-called "effective concurrent jurisdiction" can potentially resolve another criticism of pendent jurisdiction: if a State Court commits error with respect to Federal law, the injured party has ultimate redress in this Supreme Federal Court, but if a Federal Court commits error with respect to State law, there is no State Court from which the injured party may seek redress. Florida Courts have clearly indicated that the statute of limitations for securities fraud is two years. *Fowler v. Mathony*, 184 So. 2d 676 (4th D.C.A. 1966). Yet, it required a lengthy trial and appeal to establish this proposition in the Federal context.

Moreover, the existence of "effective concurrent jurisdiction" tends to nullify another argument used in

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[1]/ Indeed, the Appellate Court below indicated that Section 517.301(1), F.S.A., is strikingly similar to Section 10b of the Exchange Act. *Cyril M. Hudak v. Economic Research Analysts, Inc. and Richard W. McIntyre*, 499 Fed. 2d 996 (5th Cir. 1974).

support of pendent jurisdiction, namely, that a plaintiff who cannot append a State claim to a Federal cause of action may have to bring a separate law suit in State court to have this relief. The argument fails because a Florida State court could effectively embrace and vindicate both the Respondent's Federal rights (by virtue of Section 517.301(1), F.S.A.) and his State rights (common law fraud). The Plaintiff-Respondent would hardly have to bring a separate law suit in State court to prove common law fraud. He has already done so, and he has a judgment. Ironically, the expense of obtaining this relief was minimal: the judgment was granted by default.

Gibbs, supra, also reminds us that the "whole tendency" of Supreme Court decisions is "to require a plaintiff to try his . . . whole case at one time." The fallacy of this justification for the assumption of pendent jurisdiction may be exposed by theoretical and practical grounds, and both objections to this authority for assuming pendent jurisdiction are epitomized by the case at bar.

The "whole tendency" argument was borrowed from *Baltimore S. S. Co. v. Phillips,* 274 U.S. 316 (1927). Phillips, the plaintiff injured seaman, brought one Federal claim. He prevailed. Later, unsatisfied, he asserted another Federal claim. His second claim was denied, the denial being based upon the conclusion that "second chance" federal litigation was precluded by the doctrine of res judicata. The Respondent in State court sued those persons he felt were primarily responsible for his losses. He, too, prevailed the first time. Now, for reasons he has chosen not to divulge, Respondent wants a second chance. According to *Phillips,* he should not

have it. He has already had his day in court, and he obtained the relief he sought. What difference should it make that he now stands in the Federal orchard to take a second bite of the apple? Since pendent jurisdiction is a creature of equity, it would be incongruous to apply the doctrine here because application of the doctrine would produce an inequitable result by allowing the Respondent to have this second chance.

Therefore, it is suggested that *Phillips* is not good authority for *Gibbs*. *Gibbs* does not implement the basis of res judicata as the same was implemented in *Phillips*. The basis of the doctrine is that a plaintiff must present all his claims (or causes of action, if you will) the first time he sues, because it would be unfair to the courts and society to give him a second chance. *Phillips* invoked res judicata and denied the second claim. *Gibbs* invoked res judicata and entertained what would be the equivalent of the second claim. Based on jurisdictional results, *Phillips* is hardly authority for *Gibbs*. Indeed, if res judicata is to be used in the broadest equitable sense and in the context of power and its rightful exercise, it would seem that *Gibbs-Phillips* ought to preclude pendent jurisdiction in this cause as the Plaintiff-Respondent already obtained relief and should have sued the Petitioners that first time around.

Yet it is also suggested that the flaw in the "whole tendency" argument, as it is based upon the demands of res judicata, is more subtle than mere misreliance upon *Phillips*. The history of the case at bar will reveal this flaw.

What really is significant here is *Phillips*' reference to an exception to res judicata which specifically ad-

dresses itself to jurisdiction and the rightful exercise of the power that superior courts inherently have over lower ones. Respect is a two-way street, and *Phillips* recognizes that res judicata will not bar a claim that a prior court would not hear because it lacked jurisdiction.

The State court would have had jurisdiction to entertain the State claim in Respondent's complaint, the State court did have jurisdiction to entertain that count, and as a practical matter, the State court did give relief for that claim. All potential claims and all potential defendants should have been presented and named, respectively, at that time.

If res judicata will not bar a claim that a lower court would not hear because it lacked jurisdiction, but, if, however, a lower court did have jurisdiction over and did hear substantially the same claim (and afford relief), then it ought to follow that a higher court (here, a Federal court) by virtue of res judicata, should not entertain pendent jurisdiction. Even the exception to the doctrine is not available.

In summary, it is submitted that because the Respondent has already made his claims and made them against all he then thought responsible, and because he is required to try all his claims against all he thinks are responsible at one time, res judicata, as it pertains to pendent jurisdictional concepts, ought to bar Respondent's claim for Florida common law fraud. It is further submitted that the exception to res judicata — that the doctrine will not bar a claim that a prior court could not entertain because it lacked jurisdiction — specifically *precludes* the assertion of pendent

jurisdiction because the prior court did not lack jurisdiction. The relevance of the exception is particularly important because it is an aspect of the doctrine of res judicata — which doctrine, it will be recalled, was a major justification for the enlargement of power asserted in *Gibbs* — that specifically addresses itself to the relationship between res judicata and jurisdiction.

Gibbs also cited to similar provisions of the Federal Rules of Civil Procedure to justify its broad application of federal jurisdiction. One of the leading cases concerned with the joinder of other parties, with compulsory counter-claims, and with cross-claims, when there was original federal jurisdiction over the main claim, is *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926). *Moore* teaches that Federal courts may assume jurisdiction over these non-federal claims when they arose out of the same "transaction or occurrence" or had a "logical connection", and the reasoning of *Moore* figured strongly in *Hurn v. Oursler*, 289 U.S. 238 (1933).

But is the reasoning in *Moore* sound? Does this reasoning, based on the facts in *Moore*, support a broad approach to pendent jurisdiction. The plaintiff in *Moore* asserted a federal anti-trust claim against the defendant. The defendant counter-claimed with an allegation that the plaintiff violated state law. The Supreme Court entertained jurisdiction over both claims, and in so doing, asserted jurisdiction over a State cause of action (the counter-claim) which could not have been the basis of a Federal law suit, there being no Federal question or diversity jurisdiction. But the cases relied upon in *Moore* stand for the traditional policy that Federal jurisdiction to determine a State

claim over which there would normally not be Federal jurisdiction must be implied when the claim over which Federal jurisdiction does exist cannot be determined without first deciding the State question. *Champion Spark Plug Co. v. Champion Ignition Co.*, 247 F. 298 (Mich. 1917); *Cleveland Eng'r. Co. v. Galion Dynamic Motor Truck Co.*, 243 F. 405 (Ohio 1917); *Xenia Branch Bank v. Lee*, 7 Abb. Pr. 372 (N.Y. Sup. Ct. 1858).

However, the facts in *Moore* indicate that jurisdiction over plaintiff's anti-trust claim could have been and was decided without consideration of defendant's state law counter-claim. Also, *Moore* runs counter to earlier cases denying jurisdiction over counter-claims which did not have to be considered to resolve plaintiff's claim.

Although no counter-claim is involved here, it would not have been necessary for the Federal trial court to first resolve the State question in order to determine if it had jurisdiction over the Federal question. Indeed, the State question had already been determined in favor of the Plaintiff-Respondent, so that entertaining that State question was a waste of judicial resources.

There is, of course, a long line of cases which holds that, after the taking of evidence, a Federal court should not decline to entertain a State cause of action even if the Federal claim which gave rise to jurisdiction has been found wanting. See, e.g., 3A Moore's *Federal Practice*, Paragraph 18.07 (1.-4) and Supplement. Judicial economy, etc., are the reasons advanced in support of this admonition. But, there is also recent case law to the contrary, and this case correctly

emphasizes that the elemental teaching of *Gibbs*, *supra*, is to the effect that pendent jurisdiction is a matter of discretion. *Webb v. Bladen*, 480 Fed. 2d 306 (4th Cir. 1973):

> The district court may exercise its discretion to dismiss State claims at any point during the proceedings. Thus, although the district court should weigh the fact of already completed litigation, it may nevertheless often be proper to dismiss State claims after a trial.
>
> 488 Fed. 2d at 309.

Gibbs itself also advises that dismissal of a State claim after litigation may be merited. 383 U.S. at 727.

The case at bar is a perfect example of why this Court, after a trial on the merits, should find that there is here no Federal jurisdiction and accordingly dismiss the case. Defendants originally suggested to the Trial Court that Plaintiff's claim was barred by the statute of limitations, or alternatively, that the Trial Court should implement a two-year limitations period.

Although no reasons were given in support of the Trial Court's denial of Defendants' Motion to Dismiss, it seems a fair inference that the Motion was denied because the Trial Court did not know when the fraud was discovered, or when, in the exercise of due diligence, it should have been discovered. The absence of this information therefore necessitated a full trial. In short, the only way Defendants could possibly properly present their statute of limitations defense to the Trial Court was at or after trial.

However, since the Federal cause of action here was found to be barred by the two-year statute of limitations, this case has resolved itself into what is essentially a State claim for common law fraud which ought to be tried in State Court. With respect to the argument that such a conclusion would be hindsight adjudication and would render the entire Federal court trial an exercise in futility, with respect to the argument that such a conclusion — which ought to result in a dismissal of this law suit — would be uneconomical, unfair, and inconvenient, Petitioners respectfully suggest to the Court that the situation and result are of Respondent's own making. He brought a law suit in State Court to recover his loss, he obtained his judgment, and by renewing this claim in Federal court, he is the person who created the uneconomical, unfair, and inconvenient situation which exists now. Dismissal of this law suit would not prejudice Respondent since he already has a judgment. Worse yet, affirming the opinion below would afford the Respondent potential double recovery, and surely this would not be an equitable result.

Therefore, Petitioners request that since the Federal cause of action has been eliminated, the Court should dismiss the State cause of action on the grounds of lack of jurisdiction. This would be the most appropriate step for the Court to take. The Respondent has a judgment. By bringing the Federal law suit, the Respondent has wasted an enormous amount of judicial resources, money and time. Federal judicial resources are already strained./ The Respondent should not be

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/ See, for instance, The Geographical Boundaries of the Several Judicial Circuits: Alternative Proposals, 487 Fed. 2d.

rewarded for having wasted all this time, and certainly he should not be given potential double relief. His complaint should be dismissed for lack of jurisdiction.

The Court should set an example.

II AGENCY

"A principal is not liable for his agent's tort unless it is 'within the scope of the agent's employment.' *It is not within the scope of the employment if it is done for the agent's purposes only . . .*" (Emphasis supplied). *M. J. Uline Co. v. Cashdan*, 171 F. 2d 132 (DC Cir. 1948); *Park Transfer Co. v. Lumbermen's Mut. Casualty Co.*, 142 F. 2d 100 (DC Cir. 1944). This is the law of Florida, *City of Miami v. Simpson*, 172 So. 2d 435 (Fla. 1965); and it has been so held in the Fifth Circuit, *City of Green Cove Springs v. Donaldson*, 348 F. 2d 197 (5th Cir. 1965), and *Collazo v. John W. Campbell Farms, Inc.*, 213 F. 2d 255 (5th Cir. 1954).

Since Respondent asserted the agency, the burden was on him to prove it. *Bogue Electric Mfg. Co. v. Coconut Grove Bank*, 269 F. 2d 1 (5th Cir. 1959). *M. J. Uline, supra*, would seem to require a plaintiff to prove that the tort was done for the principal's purposes. Respondent here did not prove this. In fact, the evidence at trial was clear and unrebutted to the effect that Petersen's dealings with O'Connell were only for his own purposes and personal gain — not ERA's and McIntyre's. Both McIntyre and Petersen testified that Petersen paid McIntyre $3 or $3.50 (McIntyre's cost) per share of Stacey-Gifford stock which had been sold to O'Connell for $6 per share. If anything, McIntyre suffered a loss in the transaction. Certainly, ERA never

received commissions for Petersen's sales to the Plaintiff. Since the torts were for Petersen's benefit only, they were not within the scope of his employment. Therefore, ERA and McIntyre should not be held liable.

The foregoing notwithstanding, it cannot be said that Petersen was clothed with apparent authority. In *Bogue, supra,* the Court defined apparent authority and described the limits of liability attaching thereto. In so circumscribing said limits, the Court warned that the existence of mere "(i)solated or occasional transactions are not enough." *Bogue, supra,* at 5. Respondent has complained of four transactions. There were numerous others before and after Petersen's employment. The fact that O'Connell had dealt with Petersen during that part of 1968 prior to Petersen's registration with ERA — during which time O'Connell knew Petersen was not an agent of ERA — not only tends to isolate those four transactions even more, but tends to rebut O'Connell's claim that he was dealing with an agent of ERA.

Bogue also states that for there to be apparent authority, the third party must change his position in reliance on a representation by the principal that his agent has authority. O'Connell did not change his position after Petersen became an active registered representative of ERA. The pattern established in early 1968 continued throughout the year and into 1969. In other words, O'Connell had dealt with Petersen as an individual *before* Petersen joined ERA, and he continued to deal with Petersen as an individual *after* Petersen joined ERA. All the checks issued for the purchase of the securities giving rise to Respondent's claims, are made payable to Petersen individually.

The fact that some of these checks were endorsed by "Richard F. Petersen & Associates", a business entity obviously different than ERA, and were not endorsed by ERA, would seem to be obvious notice to the Plaintiff that he was not dealing with an agent of ERA. Therefore, a "person of ordinary prudence, conversant with business usages and the nature of the particular business" would hardly be justified in presuming that he was dealing with an agent of another company. *Bogue, supra,* at 3-4. The point is all the more telling in O'Connell's case, because he had worked for a bank. *Cf., United Bonding Ins. Co. v. Banco Suizo Panameno, S.A.*, 422 F. 2d 1142 (5th Cir. 1970), to the effect that a third party cannot rely on an agent's apparent authority if the circumstances are such as would put a reasonable man on inquiry.

Moreover, Respondent continued to buy Stacey-Gifford during 1969 and 1970 privately — that is to say, from an individual (Mr. Stacey, the president of the company) and not a stockholder. It therefore seems a fair inference that he never changed the position he adopted in early 1968. Plaintiff bought Stacey-Gifford from individuals dealing directly with the company and not through stockbrokers.

In the context of the securities world, one of the leading agency cases is *Kamen & Co. v. Paul H. Aschkar & Co.*, 382 F. 2d 689 (9th Cir. 1967), which found that the salesmen involved in a fraud had no real or apparent authority to do what they did. Referring to the Restatement of the Law of Agency, the Court quoted:

> ". . . Any substantial departure by an agent from the usual methods of conducting

business is ordinarily a sufficient warning of lack of authorization."

* * *

. . . Likewise, if the representations are as to a matter concerning which the other party, in view of business customs and other facts which he knows *or should know*, should realize the agent is not authorized to make statements, the principal is not liable for them."

382 F. 2d at 695.

In the case at bar, there were substantial departures from the usual methods of conducting business, and any reasonable man should have been aware of these departures. The checks issued by O'Connell in payment for the securities were made payable to the salesman himself, not to ERA as would have been normal and proper, and they were never endorsed by ERA, as would have been normal and proper. O'Connell did not receive confirmation slips or billing statements from ERA as would have been normal. Again, a reasonable man, especially one who had worked for a bank, claiming he dealt with a brokerage firm, should have realized that the failure to receive this evidence of the brokerage firm's participation in the transactions was a departure from the normal method of conducting business.

Furthermore, assuming that O'Connell knew — as he testified he did — that Petersen was an agent of ERA, he had the duty to determine for himself Petersen's authority to accept checks made payable to himself and not ERA:

"A third person dealing with a known agent may not act negligently with regard to the extent of the agent's authority or blindly trust the agent's statements in such respect. Rather, he must use reasonable diligence and prudence to ascertain whether the agent is acting and dealing with him within the scope of his powers. The mere opinion of an agent as to the extent of his powers or his mere assumption of authority without foundation, will not bind the principal; and a third person dealing with a known agent must bear the burden of determining for himself, by the exercise of reasonable diligence and prudence the existence or nonexistence of the agent's authority to act in the premises. The principal, on the other hand, may act on the presumption that third persons dealing with his agent will not be negligent in failing to ascertain the extent of his authority as well as the existence of his agency."

3 Am. Jur. 2d, Agency 678, P. 482.

State of mind is subjective. A mental conclusion is the result of impressions made upon one by tangible evidence, i.e., by facts. A conclusion in the mind of a third party that he is dealing with an agent can only be reasonable if the facts justifiably support the conclusion. One's beliefs and one's acts should be consistent. Believing that one is an agent but making payment to him in his individual capacity, not as an agent, and not to his principal, is a belief which is inconsistent with one's acts. The belief is not justified by the facts; the conclusion is illogical. *Cf., Ernst Iron Works v. Duralith*

Corporation, 200 N.E. 683 (CA NY 1936), and *Parsons v. Federal Realty Corp.*, 143 So. 912 (Fla. 1931).

If O'Connell thought he was dealing with Petersen as an agent, why did he make his checks payable to Petersen individually and not to ERA? If O'Connell thought he was dealing with Petersen as an agent of ERA, why, when he sued Petersen in the Fall of 1969 did he not sue McIntyre and ERA as well? The irony of the foregoing is, of course, that O'Connell never had an account with ERA, and Petersen explained to O'Connell that these were private transactions wherein he (O'Connell) was dealing with him (Petersen) on a personal basis.

For the foregoing reasons, this Court would only be justified in concluding that since Petersen had neither actual nor apparent authority to act for ERA as he did. ERA and McIntyre are not liable for his tortious acts. The Fifth Circuit erred, as a matter of law, in holding the Petitioners liable for the acts of their agent committed solely for his own purposes and benefit.

CONCLUSION

For the reasons stated, this Petition for Writ of Certiorari should be granted. It would be inappropriate for a Federal Court to entertain pendent jurisdiction, and notwithstanding, as a matter of law, Petitioners should not be held vicariously liable for the acts of their agent.

Respectfully submitted,

PORTER, TREISTER,
DONSKY & STEWART
1428 Brickell Avenue
Miami, Florida 33131
(305) 358-8850

By _____
LAWRENCE C. PORTER, of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of this Petition for Writ of Certiorari and Appendix annexed thereto were served upon Jeffrey Tew, Esquire, of TEW, TEW & MURRAY, 200 Southeast First Street, Miami, Florida 33131, Counsel for Daniel O'Connell, Respondent, by depositing the same in a United States mail box with first class postage prepaid, addressed accordingly, and in accordance with Rule 33, Supreme Court Rules, this day of November, 1974.

By _____
LAWRENCE C. PORTER, of Counsel

PORTER, TREISTER,
DONSKY & STEWART
1428 Brickell Avenue
Miami, Florida 33131
(305) 358-8850

APPENDIX

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APPENDIX A

United States Court of Appeals
for the Fifth Circuit

October Term, 1973

No. 73-2606

D. C. Docket No. 72-658 Civ-NCR

DANIEL O'CONNELL,
Plaintiff-Appellee,

versus

ECONOMIC RESEARCH ANALYSTS, INC.,
and RICHARD W. McINTYRE,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

Before BELL, GOLDBERG and CLARK,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellee pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

August 26, 1974

Issued as Mandate: Sep 17 1974

APPENDIX B

Aug. 26, 1974.

[Title Omitted]

Before BELL, GOLDBERG and CLARK, Circuit Judges.

PER CURIAM:

Plaintiff O'Connell brought this action in the United States District Court for the Southern District of Florida seeking recovery against defendants Economic Research Analysts, Inc. ("ERA"), a registered broker/dealer, and Richard W. McIntyre, its president, under sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("the Act")[1] and the Florida common law of fraud, for losses suffered in the course of certain securities transactions with one Richard F. Petersen during the time that Petersen was employed by ERA as a registered representative. The court below specifically found that defendants, as "controlling persons" within the meaning of the Act[2], were liable to plaintiff for the fraudulent practices of their employee and awarded judgment accordingly. We reverse.

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[1] 15 U.S.C. §§78j(b) and 78t(a).

[2] Every person who, directly or indirectly, controls any person liable under any provision of this chapter or any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

15 U.S.C. §78t(a).

[1] We hold today in Hudak v. Economic Research Analysts, Inc., 5 Cir. 1974, — F.2d —, [1974], a companion case, that a buyer's action instituted in Florida to recover for losses realized in sales conducted in violation of section 10(b) and Rule 10b-5 is governed by the two-year statute of limitations imposed by §517.21[1] of the Florida blue sky laws. Since the plaintiff commenced the present suit on April 27, 1973, some two and one-half years after his admitted discovery of the fraud, *see* Sargent v. Genesco, Inc., 5 Cir. 1974, 492 F.2d 750, 758, the federal claim is barred.

[2, 3] Plaintiff argues that the judgment can nevertheless stand on the basis of the state fraud claim. Though all the parties to this suit are residents of Florida, the district court unquestionably had discretion to entertain the common law action under the doctrine of pendent jurisdiction. The complaint presented a federal question of "substance sufficient to confer subject matter jurisdiction on the court," and the "state and federal claims . . . derive[d] from a common nucleus of operative fact."[2] Unfortunately, we are unable to determine from the ambiguous references to "fraud as a matter of law" in the findings and conclusions entered below whether the district court in its discretion determined to hear the pendent claim. Given the already significant outlay of public and private resources for the prosecution of this case, "considerations of judicial economy, convenience and fairness to litigants"[3] persuade us that the appropriate

---

[1] Fla.Stat.Ann., §517.21.

[2] United Mine Workers v. Gibbs, 1966, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218.

[3] United Mine Workers v. Gibbs, *supra*, at 726, 86 S.Ct. at 1139.

action is to remand the cause to the district court. If that court had intended to pass on the pendent state claim at the time judgment was entered, then explicit findings can easily be produced, making review of the merits possible. Our disposition of the federal claim adversely to plaintiff has not destroyed the *power* of the district court to conduct further proceedings on the state created cause of action. The district court was vested with discretion to hear both federal and state claims upon the filing of the complaint. While a subsequent dismissal of the federal aspect of the litigation affects the propriety of continuing with the state issues,

> we are not willing to defeat the commonsense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation—by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim.

Rosado v. Wyman, 1970, 397 U.S. 397, 405, 90 S.Ct. 1207, 1214, 25 L.Ed.2d 442.

Reversed and remanded.

APPENDIX C

No. 72-653-Civ-EC
[FILED May 24 2:33 PM '73]

DANIEL O'CONNELL,

Plaintiff,

v.

ECONOMIC RESEARCH ANALYSTS, INC., and RICHARD W. McINTYRE,

Defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FINDINGS OF FACT
CONCLUSIONS OF LAW
FINAL JUDGMENT

This cause came on to be heard before the Court for a non-jury trial on April 23, 1973. Having heard the testimony and considered the record in this cause, and the briefs submitted by Plaintiff's and Defendants' counsels, the Court now enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Plaintiff Daniel O'Connell (hereinafter referred to as the Plaintiff) is a citizen of the State of Florida, and resides in the Southern District of Florida.

2. The Defendant Economic Research Analysts, Inc. (hereinafter referred to as ERA) is a corporation organized under the laws of Florida, and has its principal place of business in the Southern District of Florida.

3. The Defendant Richard W. McIntyre (hereinafter referred to as McIntyre) is a citizen of the State of Florida, and resides in the Southern District of Florida.

4. At all times relevant to this cause, ERA was engaged in the business of a broker-dealer of securities.

5. At all times relevant to this cause, ERA was registered as a securities broker-dealer with the State of Florida, and with the United States Securities and Exchange Commission, pursuant to the Securities Exchange Act of 1934.

6. During the year 1968, McIntyre was the President and Treasurer of ERA.

7. During the year of 1969, McIntyre was the Chairman of the Board of Directors and Treasurer of ERA.

8. At all times material to this cause, McIntyre was a registered principal with the National Associa-

tion of Security Dealers (hereinafter N.A.S.D.), the Florida Securities Commission, and the United States Securities and Exchange Commission.

9. At all times material to this cause, ERA maintained business offices in the Miami, Florida area, with an office on Kane Concourse, Bay Harbor, Florida, and an office on Biscayne Boulevard, Miami, Florida.

10. From August, 1968, through July, 1969, Richard F. Petersen (hereinafter referred to as Petersen) was employed by ERA, and was registered with N.A.S.D. and with the Florida Securities Commission as a registered representative employed by ERA from September 13, 1968, through July 11, 1969.

11. The Plaintiff at all times material to this cause was a customer of ERA, with his stock and mutual fund transactions being handled by Petersen.

12. Although an account was never opened in the Plaintiff's name with ERA, the Plaintiff was aware of Petersen's position as a registered representative of ERA, and thought he was dealing with Petersen in his capacity as a registered representative of ERA at all times material to this cause.

13. Plaintiff visited Petersen at the ERA office on Kane Concourse, in Bay Harbour, Florida, on several occasions, and also placed telephone calls to him at that address in regard to various stock and mutual fund transactions.

14. At all times material to this cause, McIntyre knew, or should have known, that Plaintiff was a customer of Petersen.

15. In November, 1968, Petersen purchased from McIntyre 550 shares of Stacey-Gifford Company stock, at a price of between $3.00 and $3.50 per share, with the intent to transfer these shares to the Plaintiff at $6.00 per share.

16. McIntyre knew of Petersen's purpose to transfer the 550 shares of Stacey-Gifford Co. stock to the Plaintiff at $6.00 per share.

17. Petersen did transfer the 550 shares of Stacey-Gifford Co. stock to the Plaintiff at $6.00 per share.

18. Neither Petersen nor McIntyre informed the Plaintiff, nor disclosed to the Plaintiff, that the 550 shares of Stacey-Gifford Co. stock were purchased directly from McIntyre's personal account by Petersen at a price between $3.00 and $3.50 per share.

19. The Plaintiff did not know at the time he purchased the 550 shares of Stacey-Gifford Co. stock from whom he was purchasing the stock.

20. The Plaintiff paid to Petersen, by two (2) cashier's checks made payable to Petersen, a total of Three Thousand Three Hundred Dollars ($3,300.00) for the purchase of the 550 shares of Stacey-Gifford Co. stock on November 13, 1968.

21. ERA was a member of the selling group for the Colonial Ventures mutual fund.

22. Petersen, in his capacity as a registered representative of ERA, made several sales of shares in the

Colonial Ventures mutual fund to the public, and received commissions from ERA for such sales.

23. On or about January 28, 1969, the Plaintiff tendered to Petersen, in his capacity as a registered representative of ERA, a cashier's check made payable to Petersen in the amount of Three Thousand Dollars ($3,000.00), for an investment by the Plaintiff in the Colonial Ventures mutual fund.

24. Petersen fraudulently converted the Plaintiff's $3,000.00 to his own use.

25. Petersen never tendered or delivered to the Plaintiff any of the Colonial Ventures shares.

26. Petersen never acquired or furnished any Colonial Ventures shares for the Plaintiff's account.

27. Petersen never returned the $3,000.00 for the purchase of the Colonial Ventures shares to the Plaintiff.

28. Petersen falsely represented and stated to the Plaintiff that he (Petersen) had caused to be purchased for the Plaintiff's account $3,000.00 worth of shares in the Colonial Ventures mutual fund.

29. On or about March 18, 1969, the Plaintiff tendered to Petersen, in his capacity as a registered representative of ERA, a cashier's check made payable to Petersen, in the amount of One Thousand Eight Hundred Dollars ($1,800.00) for the purchase of 300 additional shares of Stacey-Gifford Co. stock.

30. Petersen fraudulently converted the Plaintiff's $1,800.00 to his own use.

31. Petersen never tendered or delivered to the Plaintiff the 300 additional shares of Stacey-Gifford Co. stock.

32. Petersen never acquired or furnished any of the 300 additional shares of Stacey-Gifford Co. stock for the Plaintiff's account.

33. Petersen never returned the $1,800.00 for the purchase of the additional 300 shares of Stacey-Gifford Co. stock to the Plaintiff.

34. Petersen falsely represented and stated to the Plaintiff that he (Petersen) had caused to be purchased for the Plaintiff's account 300 additional shares of Stacey-Gifford Co. stock at a price of $1,800.00.

35. On or about May 19, 1969, the Plaintiff tendered to Petersen, in his capacity as a registered representative of ERA, a cashier's check made payable to Petersen in the amount of Seven Thousand Dollars ($7,000.00), for the purchase of 5,000 shares of Neureus, Inc. stock for the Plaintiff.

36. In connection with the purchase of the Neureus, Inc. stock, Petersen informed the Plaintiff that such a purchase would represent a prudent investment, and induced the Plaintiff to cancel his prior tender of $3,000.00 for the purchase of Colonial Ventures mutual fund shares and invest, in addition to that $3,000.00, another $7,000.00 for an investment of $10,000.00 in 5,000 shares of Neureus, Inc. stock.

37. Petersen never tendered or delivered to the Plaintiff the 5,000 shares of Neureus, Inc. stock.

38. Petersen never acquired or furnished any of the 5,000 shares of Neureus, Inc. stock for the Plaintiff's account.

39. Petersen never returned the $10,000.00 for the purchase of the 5,000 shares of Neureus, Inc. stock to the Plaintiff.

40. On July 11, 1969, Petersen sent to the Plaintiff, through the United States mail, a stock certificate representing 5,000 shares of stock in Marine Environmental Data, Inc. (Plaintiff's exhibit number 2).

41. The Plaintiff never requested or instructed Petersen to acquire the 5,000 shares of Marine Environmental Data, Inc. stock for him.

42. Petersen terminated his position with ERA in July, 1969.

43. Petersen was subsequently convicted in the Criminal Court of Record in and for Dade County, Florida, in case number 69-7043, on three counts of grand larceny for the above-mentioned transactions with the Plaintiff in January, March and May of 1969.

44. While Petersen was a registered representative of ERA, Petersen maintained his principal place of business in his own office, which bore the name "Richard F. Petersen Associates, Inc.," and was located on Sans Souci Boulevard, North Miami, Florida.

45. Petersen was permitted to operate his business as a registered representative of ERA on an independant basis from ERA.

46. Section 27 of the Rules of Fair Practice of the N.A.S.D. provides, in part, that:

> (a) Each member shall establish, maintain, and enforce written procedures which will enable it to supervise properly the activities of each registered representative and associated person to assure compliance with applicable securities laws, rules, regulations and statements of policy promulgated thereunder and with the rules of the Association.
>
> (b) Final responsibility for proper supervision shall rest with the member. The member shall designate a partner, officer or manager in each office of supervisory jurisdiction, including the main office, to carry out the written supervisory procedures. A copy of such procedures shall be kept in each such office.
>
> (c) Each member shall be responsible for keeping and preserving appropriate records for carrying out the member's supervisory procedures. Each member shall review and endorse in writing, on an internal record, all transactions and all correspondence of its registered representatives pertaining to the solicitation or execution of any securities transaction.

(d) Each member shall review the activities of each office, which shall include the periodic examination of customer accounts to detect and prevent irregularities or abuses and at least an annual inspection of each office of supervisory jurisdiction.

(f) 'Office of supervisory jurisdiction' means any office designated as directly responsible for the review of the activities of registered representatives or associated persons in such office and/or in other offices of the member.

47. In accordance with Section 27(a) of the Rules of Fair Practice of the N.A.S.D., ERA established written local rules of its own. (Plaintiff's exhibit number 8)

48. ERA's local rules specifically prohibit any registered representative from acting independantly, from raising money, except as an agent of ERA, from acting as a personal custodian for a clients' money, and from accepting money from a client except as the agent of ERA. The rules further provide that ERA is responsible for all the actions of its registered representatives. (Plaintiff's exhibit number 8)

49. Pursuant to the rules of the N.A.S.D., ERA is required to provide each of its registered representatives with a copy of ERA's local rules, as well as a copy of the Rules of Fair Practices of the N.A.S.D..

50. In his capacity as an officer of ERA and as a registered principal with the N.A.S.D., McIntyre was required to establish and diligently maintain a program

of supervision over the registered representatives of ERA.

51. McIntyre did not maintain a program of supervision over Petersen's activities as a registered representative of ERA.

52. No one in a managerial position from ERA ever visited Petersen's office.

53. Petersen's visits to the ERA offices between August, 1968 and July, 1969 were on a voluntary basis only.

54. This cause was commenced on April 27, 1972.

CONCLUSIONS OF LAW

1. Jurisdiction of this cause is based upon Title 28, United States Code, Section 1331(a), and Title 15, United States Code, Section 78aa.

2. The substantive federal cause of action is created in this case by the Securities Exchange Act of 1934, Section 10(b), Title 15, United States Code, Section 78j(b), which states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —
>
> (b) to use or employ, in connection with the purchase or sale of any security registered on a

national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in public interest or for the protection of investors.

3. The intrastate use of telephones is within the prohibition of Section 10(b) of the Securities Exchange Act of 1934 prohibiting the use of manipulative and deceptive devices in the purchase or sale of securities by the use of any means or instrumentality of interstate commerce. *Myzel v. Fields,* 386 F.2d 718 (8th Cir. 1967), *cert. denied,* 88 S.Ct. 104 (1968).

4. The telephone calls made by the Plaintiff to Petersen regarding the Plaintiff's stock and mutual fund transactions involved the use of an instrumentality of interstate commerce within the meaning of Section 10(b) of the 1934 Securities Exchange Act.

5. Rule 10b-5, Regulations Section 240.10b-5, which was promulgated by the Securities and Exchange Act of 1934, provides that:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of a national securities exchange,

(1) to employ any device, scheme or artifice to defraud, (2) to make an untrue statement of a material fact or to omit to state a material

fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

6. The basic test of "materiality" to be applied under Rule 10b-5 is whether a reasonable man would attach importance to the fact not disclosed in determining his choice of action in the transaction in question. *Rogen v. Ilikon Corporation,* 361 F.2d 260 (1st Cir. 1966).

7. Petersen and McIntyre's failure to disclose to the Plaintiff that the 550 shares of Stacey-Gifford Co. stock purchased by the Plaintiff in November of 1968 at $6.00 per share were purchased directly by Petersen from McIntyre's personal account at a price between $3.00 and $3.50 per share constituted an omission to state a material fact by Petersen and McIntyre, and a deceptive device to defraud the Plaintiff.

8. Petersen's false representation to the Plaintiff that he (Petersen) had caused $3,000.00 worth of shares in the Colonial Ventures mutual fund to be purchased for the Plaintiff, and Petersen's conversion of the Plaintiff's money, constituted a misrepresentation of a material fact by Petersen, a device to defraud the Plaintiff, and a fraud upon the Plaintiff as a matter of law.

9. Petersen's false representation to the Plaintiff that he (Petersen) had caused to be purchased for the

Plaintiff 300 additional shares of Stacey-Gifford Co. stock at a price of $1,800.00, and Petersen's conversion of the Plaintiff's money, constituted a misrepresentation of a material fact by Petersen, a device to defraud the Plaintiff, and a fraud upon the Plaintiff as a matter of law.

10. Petersen's false representation to the Plaintiff that he (Petersen) would acquire for the Plaintiff's account 5,000 shares of Neureus, Inc. stock at a price of $10,000.00 constituted a misrepresentation of a material fact by Petersen, a device to defraud the Plaintiff, and a fraud upon the Plaintiff as a matter of law.

11. Accordingly, Petersen's omission to state a material fact and his misrepresentations of material facts to the Plaintiff, as well as his conversion of the Plaintiff's money, constituted deceptive devices and contrivances in connection with the sale of securities to the Plaintiff in contravention of the Securities Exchange Act of 1934, Section 10(b), Title 15, United States Code, Section 78j(b).

12. Section 20(a) of the Securities Exchange Act of 1934, which is Title 15, United States Code, Section 78t(a), states that:

> Every person who, directly or indirectly controls any person liable under any provision of this chapter or any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person is liable, unless the controlling person acted in good faith and did not

directly or indirectly induce the act or acts constituting the violation or cause of action.

13. Section 20(a) of the 1934 Securities Exchange Act is remedial in nature, and is to be liberally construed. *Myzel v. Fields, supra.*

14. Regulations Section 230.405(f), which was promulgated by the Securities and Exchange Commission under Section 20(a) of the 1934 Securities and Exchange Act, provides that:

> The terms "control" (including the terms "controlling," "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of management and policies of a person by contract or otherwise.

15. Petersen's actions as a registered representative of ERA were under the direction of, and were to be supervised by, McIntyre and ERA as required by law and the securities agencies of which they were members. Accordingly, McIntyre and ERA were controlling persons within the meaning of Section 20(a) of the 1934 Securities Exchange Act, Title 15, United States Code, Section 78t(a) during all times material to this cause.

16. Liability is imposed upon a controlling person under Section 20(a) of the 1934 Securities Exchange Act for the deceptive conduct of a controlled person, if the controlling person failed to maintain and diligently enforce a proper system of internal supervision and control over the controlled person. *Securities and Exchange Commission v. First Securities Company of Chicago,* 463 F.2d 981 (7th Cir. 1972).

17. ERA and McIntyre, as controlling persons, failed to establish, maintain, or diligently enforce a proper system of supervision and control of Petersen's activities and transactions as a registered representative of ERA. Accordingly, ERA and McIntyre, as controlling persons, are liable to the Plaintiff under Section 20(a) of the 1934 Securities Exchange Act for the deceptive conduct of Petersen.

18. By not establishing, maintaining, or diligently enforcing a proper system of supervision and control of Petersen's activities and transactions as a registered representative of ERA, McIntyre and ERA did not act in good faith. As such, neither McIntyre nor ERA are within the "good faith" clause of Section 20(a) of the 1934 Securities Exchange Act. *Hecht v. Harris, Upham and Co.*, 430 F.2d 1202 (9th Cir. 1970).

19. Since the Securities Exchange Act of 1934 does not contain a statute of limitations, a federal court in a suit brought upon that Act, must look and apply the applicable statute of limitations of the forum state. *Myzel v. Fields, supra.*

20. The Florida statute of limitations applicable in this case is Florida Statute Section 95.11, which provides that an action may be brought on the grounds of fraud within three (3) years of the date the facts constituting the fraud are discovered by the Plaintiff. *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5 (5th Cir. 1967).

21. "Discovery" means actual knowledge or notice of facts which, in the exercise of due diligence, would have led to actual knowledge of the violation. *Azalea Meats, Inc. v. Muscat, supra.*

22. Plaintiff did not have actual notice or knowledge of Petersen's fraudulent activities until at least July of 1969, when Petersen terminated his position with ERA as a registered representative of ERA, and also sent to the Plaintiff the stock certificate for 5,000 shares of Marine Environmental Data, Inc. stock which Plaintiff had not instructed Petersen to acquire for him. Furthermore, Plaintiff never received notice of any facts that Petersen was fraudulently deceiving him until Plaintiff received the certificate for 5,000 shares of Marine Environmental Data, Inc. stock that Plaintiff had not instructed Petersen to acquire for him. Accordingly, Plaintiff did not discover either by actual knowledge or notice, Petersen's fraudulent activities until at least July of 1969.

23. Since this cause was commenced within three (3) years of Plaintiff's discovery of Petersen's fraudulent activities, the Plaintiff's cause of action is not barred by the three year statute of limitations period contained in Florida Statutes, Section 95.11.

FINAL JUDGMENT

The Court having determined that the Plaintiff is entitled to recovery, it is ORDERED and ADJUDGED that the Plaintiff, DANIEL O'CONNELL, shall have and recover of and from the Defendants, ECONOMIC RESEARCH ANALYSTS, INC., a Florida corporation, and RICHARD McINTYRE, individually, jointly and severally, the principal amount of Fifteen Thousand One Hundred Dollars ($15,100.00), with interest from November 13, 1968 to the date of this Judgment, at six percent (6%) per annum, on the amount of Three Thousand Three Hundred Dollars ($3,300.00); with

interest from January 28, 1969 to the date of this Judgment, at six percent (6%) per annum, on the amount of Three Thousand Dollars ($3,000.00); with interest from March 18, 1969 to the date of this Judgment, at six percent (6%) per annum, on the amount of One Thousand Eight Hundred Dollars ($1,800.00); and with interest from May 19, 1969 to the date of this Judgment, at six percent (6%) per annum, on the amount of Seven Thousand Dollars ($7,000.00); plus reasonable attorney fees, and the costs of this action to be taxed by the Clerk of the Court, and for all such sums let execution issue.

DONE and ORDERED at Miami, Florida, this 24th day of May, 1973.

SENIOR UNITED STATES DISTRICT JUDGE

JEFFREY ALLEN TEW, ESQ.
TEW, TEW, ROZEN & MURRAY
Attorneys for Plaintiff
200 S.E. First Street
Suite 804
Miami, Florida 33131

WARREN S. SALOMON, ESQ.
Attorney for Defendants
1840 Coral Way
Miami, Florida

GUY K. STEWART, JR., ESQ.
WILLIAMS, SALOMON, KANNER & DAMIAN
Attorneys for Defendants
1003 duPont Building
Miami, Florida 33131

APPENDIX D

[EXHIBITS OMITTED]

CIVIL ACTION No. 69-15187

DANIEL O'CONNELL,

Plaintiff,

vs.

MARINE ENVIRONMENTAL DATA, INC.,
a Florida corporation,
FRANCIS C. GIBOUT,
RICHARD F. PETERSEN,
AND ANN H. PETERSEN,
jointly and individually,

Defendants.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY.

ACTION FOR DAMAGES FOR FRAUD

COMES NOW the Plaintiff, Daniel O'Connell, by and through his undersigned attorney, and sues the Defendants, Marine Environmental Data, Inc., a Florida corporation, Francis C. Gibout, Richard F. Petersen and Ann H. Petersen, jointly and individually, and demands damages against said Defendants for fraud, and alleges as follows:

1. This is an action for damages for fraud, for more than $5,000.00, and within the jurisdiction of this Court.

2. On or about January 28, 1969, Defendant, Richard F. Petersen, as a securities salesman, induced the Plaintiff to give said Defendant the sum of $3,000.00 so that said Defendant could purchase shares of a mutual fund known as Colonial Ventures, Inc., which fund was soon to make its appearance on the market.

3. That on or about March 18, 1969, the Defendant, Richard F. Petersen, as a securities salesman, induced the Plaintiff to give said Defendant the sum of $1800.00 so that said Defendant could purchase 300 shares of the Class A. capital stock of Stacy-Gifford Company.

4. That on or about May 19, 1969, Defendant, Richard F. Petersen, induced the Plaintiff to give him the sum of $7,000.00 so that said Defendant could sell the $3000.00 worth of shares of the mutual fund known as Colonial Ventures, Inc., and purchase 5000 shares of the capital stock of a company called Neureus, Inc.

5. That all of the above mentioned funds were actually given by the Plaintiff to the Defendant, Richard F. Petersen, on or about the dates hereinabove stated, by Cashier's checks, copies of which are attached hereto and made a part hereof for all purposes, which the said Defendant, Richard F. Petersen, accepted for the purposes hereinabove stated.

6. That the Defendant, Richard F. Petersen, never intended to purchase the stocks or shares of said

mutual fund which he promised to do, as a salesman of securities.

7. That in fact, said Defendant, Richard F. Petersen, never even paid the above sums to the brokerage house or securities dealer for whom he was employed, either for the purposes for which said Defendant obtained said sums from the Plaintiff, or for any purpose whatsoever.

8. That in fact, said Defendant, Richard F. Petersen, did not even put said sums into an escrow or trust account, but utilized said sums for his own purposes.

9. That Defendant, Richard F. Petersen, was in a fiduciary capacity with the Plaintiff at the times and for the purposes of obtaining the above stated sums from the Plaintiff, for the purposes of obtaining the securities hereinabove referred to.

10. That Defendant, Richard F. Petersen, willfully and knowingly misrepresented the purposes for which he obtained the aforesaid sums from the Plaintiff, and fraudulently obtained said sums for said Defendant's own personal purposes, thereby obtaining the aforesaid funds through misrepresentation of material facts.

11. That prior to January 28, 1969, the Defendant, Richard F. Petersen, had obtained funds from the Plaintiff for purposes of purchasing securities for the Plaintiff, and had actually done that which he promised to do.

12. That in fact, Defendant, Richard F. Petersen, never purchased any shares of the mutual fund known as Colonial Ventures, Inc. for the Plaintiff, even though he advised the Plaintiff that he would "take you out of Colonial Ventures, Inc."

13. That when Plaintiff started making demands for his securities that were supposed to have been purchased for Plaintiff by Defendant, Richard F. Petersen, in June, 1969, Defendant, Richard F. Petersen advised that the stock of Neureus, Inc. would shortly be forthcoming, as would be the stock of Stacy-Gifford Company.

14. That when Plaintiff continued to press Defendant, Richard F. Petersen, for securities, approximately the first week of July, 1969, Defendant, Richard F. Petersen, advised Plaintiff that a better stock had become known to Defendant, Richard F. Petersen, and that said Defendant would be able to deliver 5000 shares of the capital stock of Defendant, Marine Environmental Data, Inc., to the Plaintiff, which stock said Defendant alleged to be worth $10,000.00 and would be in satisfaction of the $3000.00 originally obtained on or about January 28, 1969 from the Plaintiff for the purchase of shares of the mutual fund known as Colonial Ventures, Inc., and $7000.00 said Defendant obtained from the Plaintiff on or about May 19, 1969 for the alleged purpose of purchasing the stock of a company known as Neureus, Inc.

15. That Defendant, Richard F. Petersen, advised Plaintiff that Defendant corporation had been in business for a substantial period of time and was doing very well and was shortly going to "go public at $10.00 per share".

16. That in truth, and in fact, the Defendant corporation was actually chartered on or about June 20, 1969, with authorized stock of 1,000,000 shares at par value of ten cents per share, and the only money in the corporate account of said Defendant corporation was that which it could obtain by the sale of its capital stock to victims that it was able to induce to purchase, and which stock was actively being touted by Defendant, Richard F. Petersen, and by Defendant, Francis C. Gibout, all in violation of the securities laws.

17. That Defendant Richard F. Petersen, entered into a conspiracy with Defendant, Francis C. Gibout, and Defendant, Ann H. Petersen, and the Defendant corporation, to transfer 5000 shares of the capital stock of the Defendant corporation to the Plaintiff in lieu of the shares of Neureus, Inc., which Defendant, Richard F. Petersen, had promised to the Plaintiff, which shares of Neureus, Inc. were to have been in lieu of the shares of the mutual fund, Colonial Ventures, Inc., which Defendant, Richard F. Petersen, had previously promised to the Plaintiff.

18. That Defendant, Francis C. Gibout, was peculiarly in a position to assist Defendant, Richard F. Petersen, in this fraudulent conspiracy, since Defendant, Francis C. Gibout, was the president of the Defendant corporation, and was also a securities salesman.

19. That Defendant, Ann H. Petersen, was likewise in a position to assist Defendant, Richard F. Petersen, since she was not only the wife of said Defendant, Richard F. Petersen, but was also the Secretary of the defendant corporation.

20. That Defendant, Francis C. Gibout, and Defendant, Ann H. Petersen, actually executed certificate #3 of Defendant corporation, for 5000 shares, making same out to the Plaintiff and his wife, and dating same the 11th day of July, 1969.

21. That the fraudulent conspiracy hereinabove referred to, thereby became fully executed when all of the Defendants attempted to foist said certificate of stock of Defendant corporation onto the Plaintiff, a copy of which certificate is attached hereto and made a part hereof for all purposes.

22. That the aforesaid certificate of stock of Defendant corporation was issued to Plaintiff and his wife, against their will, and without their desire, and they thereupon promptly refused same.

23. That said certificate of Defendant corporation was issued contrary to the securities laws by all of the Defendants hereinabout.

24. That despite the refusal of Plaintiff to accept said certificate of Defendant corporation from Defendant, Richard F. Petersen, on July 11, 1969, Defendants sent the same certificate of Defendant corporation to Plaintiff and his wife by mail registered, return receipt requested, dated July 15, 1969, a copy of which letter is attached hereto and made a part hereof for all purposes.

25. That the matters contained in said letter are contrary to the securities laws.

26. That Defendants, Francis C. Gibout, Richard F. Petersen, and Ann H. Petersen, are all directors of

Defendant corporation at the times hereinabove referred to, and that Defendant, Richard F. Petersen, was also the Vice President of Defendant corporation.

27. That in order to induce Plaintiff to accept the said stock certificate of Defendant corporation, Defendant, Richard F. Petersen, advised Plaintiff that said defendant was arranging for 5000 shares of stock of Defendant corporation to be transferred to Dade County Commissioner Thomas D. O'Malley, because said commissioner had promised to use his influence as a County Commissioner to obtain a contract for Defendant corporation with Dade County.

28. That all of the Defendants have participated wilfully and knowingly, and have acted fraudulently, and contrary to law, and have, and are engaged in a cunning scheme or plan to bilk the Plaintiff and members of the public at large.

29. That the actions of the Defendants, jointly and individually, reflect a wanton, gross, wilfull fraud, entitling Plaintiff to compensatory damages, and punitive damages.

30. That Plaintiff has not been paid any portion of the $11,800.00 hereinabove referred to.

WHEREFORE, Plaintiff demands damages against the Defendants, jointly and individually, for

fraud, and demands compensatory damages of $11,800.00, together with punitive damages of $60,000.00

Plaintiff demands trial by jury.

LEONARD H. RUBIN
Attorney for Plaintiff
Suite 1621, Alfred I duPont Building
Miami, Florida 33131

APPENDIX E

CIVIL ACTION NO. 69-15187
(Vann)

DANIEL O'CONNELL,

Plaintiff,

vs.

MARINE ENVIRONMENTAL DATA, INC., etc., et al,

Defendants.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY.

FINAL JUDGMENT

THIS CAUSE came on before me, the undersigned, one of the Judges of the above styled Court upon Plaintiff's Motion For Entry of Final Judgment, and it appearing that the Clerk of the above styled Court has entered default against each and every of the Defendants in this cause, and it further appearing that there is due the sum of $11,800.00 liquidated compensatory damages to Plaintiff from Defendants, and that no part thereof has been paid, it is now ordered and adjudged that Plaintiff, Daniel O'Connell, is hereby granted

Final Judgment, against the Defendants, Marine Environmental Data, Inc., a Florida corporation, Francis C. Gibout, Richard F. Petersen and Ann H. Petersen, jointly and individually, in the sum of $11,800.00, together with costs in the sum of $45.00, which consists of Clerk's filing fee of $25.00 and Sheriff's service charges of $5.00 for each of the four Defendants, thereby totaling $11,845.00, for which amount the Clerk of the above styled Court is hereby ordered to let execution issue.

DONE, ORDERED and ADJUDGED in Chambers at the Dade County Courthouse in Miami, Florida this 7th day of February, 1972.

/s/ HAROLD R. VANN
CIRCUIT JUDGE